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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1890.**

No. 357.

THE GREGORY CONSOLIDATED MINING COMPANY AND HENRY E. KAVANAUGH, PLAINTIFFS IN ERROR,

*vs.*

LEWIS M. STARR.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

**FILED APRIL 24, 1888.**

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1 In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

LEWIS M. STARR, Plaintiff,
*vs.*
THE GREGORY CONSOLIDATED MINING COMPANY and HENRY E. KAVANAUGH, Defendants.

Be it remembered that the Gregory Consolidated Mining Company herewith presents this its statement on appeal in the above-entitled action, and declares that the following were and are all the proceedings had in said action, to wit:

That on the 19th day of May, 1884, said plaintiff filed his complaint therein in the district court of the said district, in Montana Territory, in and for the county of Lewis & Clarke; which said complaint was in words and figures following:

(Title of Cause.)

Plaintiff for cause of complaint against defendant avers:

2 I.

That on the 28th day of July, 1883, one G. H. Malter and the plaintiff were partners doing business in the city and county of San Francisco, State of California, under the firm name and style of the Ætna Iron Works.

II.

That on the 28th day of July, 1883, the defendant was and still is a corporation duly incorporated and existing under and by virtue of the laws of the State of New York and doing business in the Territory of Montana.

III.

That on the said 28th day of July, 1883, the plaintiff and said G. H. Malter, as partners as aforesaid, entered into a contract in writing with the defendant, by which contract said plaintiff and said Malter agreed to build and equip, as hereinafter set out, a complete concentrating mill having the capacity of reducing seventy-five tons of ore *per diem* for the defendant herein, at Gregory, in the Territory of Montana, and to equip said mill with the following machinery, to wit:

Two rock-breakers, 8 x 12.

Two sets of 26-inch rolls and two sets of 20-inch rolls with steel shells for each set. One elevator, one complete set of revolving sizing-screens. Twelve jigs similar to those designed by Professor Hesse at the mine.

3 All necessary shafting to drive the above machinery; all necessary sizing-boxes, spitzkasten, sluice, and tracks, and generally everything necessary and requisite to complete and place

in perfect running order as designed by G. H. Malter, of said San Francisco, and accepted, with corrections, by Professor Hesse.

It was further specified in said contract that said Starr and Malter should place the above-enumerated machinery in perfect working order, in a first-class and workmanlike manner, in a suitable building of the description designed, and that all foundations and banks upon which said building and machinery was to stand should be provided with suitable retaining walls of stone where required; that said Starr and Malter should be at liberty to use the engine and boiler and such material and machinery as might be available from an old concentrator belonging to the defendant herein.

In consideration whereof the defendant herein in and by said contract promised and agreed to pay said Starr and Malter the sum of twenty thousand dollars upon receipt at Helena, Montana, of a bill of lading, showing the shipment of said machinery from said San Francisco, and the sum of thirty thousand dollars in three equal monthly installments, to become due and payable respectively
4 in thirty, sixty, and ninety days from the acceptance upon completion of said mill by the defendant herein.

That said Starr and Malter performed all the conditions of said contract by them to be performed and fully completed said mill and the same was fully accepted by the defendant herein more than thirty days prior to the commencement of this action; that defendant, though often demanded, has not paid the sum of ten thousand dollars due, as by said contract, thirty days after the completion and acceptance of said mill, but refuses and neglects to pay the same.

That prior to the commencement of this action the said copartnership between plaintiff and said Malter was dissolved, and said Malter for value assigned and set over to plaintiff all his interest in and to the assets of said copartnership and in and to the contract aforesaid and the moneys due thereon and plaintiff is now the sole owner and holder thereof.

And for a further and separate cause of action plaintiff saith:

I.

That he was at all times hereinafter named and now is doing business in San Francisco under the name of "Ætna Iron Works."

II.

That on or about May first, 1884, plaintiff sold and delivered
5 to the defendant, at his special instance and request, two mining cars of the value of one hundred and sixty-five dollars each, to wit, of the value of three hundred and thirty dollars, and four roller shells, finished, of the value of four hundred and seventy dollars; that to pay for same or any part thereof plaintiff absolutely refuses and neglects.

Werefore plaintiff prays judgment against defendant on the first cause of action for the sum of ten thousand dollars, and on the second cause of action for the sum of eight hundred dollars, and in

all for the sum of ten thousand eight hundred dollars, with legal interest thereon from the date of filing this complaint, and for costs of suit.

SANDERS & CULLEN,
*Att'ys for Pl'ff.*

TERRITORY OF MONTANA, }
*County of Lewis & Clarke,* } *ss:*

W. E. Cullen, being first duly sworn, says that he is one of the attorneys for plaintiff in the above-entitled action; that the reason why this verification is made by affiant and is not made by plaintiff in person is because said plaintiff is not now in the county of Lewis and Clarke, wherein his said attorneys reside, and is therefore unable to verify the same; that affiant has read the foregoing complaint and knows the contents thereof, and the facts therein stated are true to the best knowledge, information, and belief of affiant.

6 W. E. CULLEN.

Subscribed and sworn to before me this 19th day of May, 1884.
J. R. ALDEN,
*Dep-ty Clerk.*

That thereafter, to wit, on the 28th day of May, 1884, the defendant, The Gregory Consolidated Mining Company, filed its demur- to said complaint; which said demur- was in words and figures following:

(Title of Cause.)

Now comes defendant and demurs to the complaint of the plaintiff herein for the reason that the same does not state facts sufficient to constitute a cause of action.

E. W. & J. K. TOOLE,
*Def't's Att'ys.*

That thereafter, on the 11th day of November, 1884, said demurrer coming on to be heard by the court, the same was overruled.

That thereafter, on the 14th day of November, 1884, said defendant filed its answer to said complaint in words and figures following:

(Title of Cause.)

Comes now the defendant, and, for answer to the complaint of plaintiff, on its information and belief, denies that said G. H.
7 Malter and plaintiff were partners, or that said Malter assigned said interest as such in the contract set out in said complaint, and denies that this defendant, at the date mentioned or at any other time, ever made or entered into the contract upon which this action was instituted or *were* or *are* indebted to any one in any sum thereunder or agreed to pay any sum whatever upon the terms or conditions mentioned in said complaint, and denies that said Hesse or any one else for this defendant accepted or re-

ceived said work or machinery under said contract or as completed according to the terms thereof, and asks judgment for its costs.

E. W. AND J. K. TOOLE,
*Att'ys for Defendant.*

TERRITORY OF MONTANA,
*County of Lewis and Clarke.*

Harry W. Child makes oath and says that he is agent and superintendent for said defendant, and that the matters set forth in the foregoing answer are true to the best knowledge, information, and belief of affiant.

HARRY W. CHILD.

Subscribed and sworn to before me this 13th day of November, A. D. 1884.

JOS. K. TOOLE,
*Notary Public, Montana.*

8 That thereupon said cause having come regularly on for trial in the court aforesaid on the 15th day of March, 1886, the following evidence was introduced to support the issues in said cause by said plaintiff, to wit:

HARRY W. CHILD, being first duly sworn, testified as follows:

"I was the assistant general manager of the Gregory Consolidated Mining Company on the 28th day of July, 1883. I recognize this contract" (here contract handed witness) "as a contract made by me a- assistant general manager of said defendant with the Ætna Iron Works and recognize my signature thereto. I have a duplicate or copy of said contract."

Thereupon said contract was offered and read in evidence by plaintiff, same being in words and figures as follows:

Memorandum of an agreement made and entered into, at the city and county of San Francisco, State of California, this 28th day of July, A. D. 1883, by and between the Ætna Iron Works, owned by Malter and Starr, the parties of the first part, and the Gregory Consolidated Mining Company, a corporation duly incorporated and existing under and by virtue of the laws of the State of New York, party of the second part, witnesseth:

9 That the said parties of the first part, for and in consideration of the performance of the conditions hereinafter agreed to be performed by the said party of the second part, hereby agree to build and equip, as hereinafter set out, a complete concentrating mill, having the capacity of reducing seventy-five (75) tons of ore *per diem*, for said party of the second part, at Gregory, in the Territory of Montana, and to equip said mill with the following machinery, to wit:

Two rock-breakers, 8 by 12.

Two sets of 26-in. rolls, and two sets of 20-in. rolls, with steel shells for each set.

One elevator.

One complete set of revolving sizing-screens.

Twelve jigs similar to those designed by Professor Hesse at the mine.

All necessary shafting to drive the above machinery.

All necessary sizing-boxes, spitzkasten, sluice, and tracks, and generally everything necessary and requisite to complete and place in perfect running *running* order, as designed by G. H. Malter, of said San Francisco, and accepted, with corrections, by Professor Hesse.

Reference is hereby had to said plans of G. H. Malter, as corrected by Professor Hesse, and said corrected plans are made a part hereof.

The machinery above enumerated is to be placed in per-
10 fect working order, in a first-class and workmanlike manner, in a suitable building of the description designed, and all foundations and banks upon which said building and machinery are to stand shall be provided with suitable retaining walls of stone where required.

The engine and boiler and such material and machinery as are available from the old concentrator may be used by said party of the first part.

The whole mill, with all machinery, shall be completed and delivered in perfect running order within four (4) months from date, provided the lumber required to be used in constructing the building and placing the machinery therein is delivered on the ground at Gregory aforesaid, at the price of twenty-five (25) dollars per thousand feet, within forty (40) days after the receipt of the bill for said lumber by H. W. Child, representing said party of the second part.

Said party of the second part hereby guarantees that the cost of freight from the point of railroad nearest said Gregory to said Gregory shall not exceed one and one-half cents per pound, and if said freight shall exceed said price per pound said party hereby agrees to pay such excess to said party of the first part, and said
11 party of the second part shall receive the benefit of any charge less than said price of one and one-half cents per pound.

It is understood between the parties hereto, and the said party of the first part hereby guarantees, that said machinery when complete shall successfully reduce and concentrate, as agreed upon between Prof. Hesse and G. H. Malter, the amount of ore above named as coming from the mine owned by said party of the second part and known as the Gregory mine, and said party of the second part hereby agrees to pay said party of the first part for said work as follows, to wit: The sum of twenty thousand (20,000) dollars upon receipt, at Helena, Montana, of a bill of lading showing the shipment of said machinery from said San Francisco, and the sum of thirty thousand (30,000) dollars in three equal monthly instalments, to become due and payable respectively in thirty, sixty, and ninety days from the acceptance upon completion of said mill by said party of the second part.

In witness whereof said parties have hereunto set their hands and seals, at the city and county of San Francisco aforesaid, the day and year hereinabove first written.

(Signed) ÆTNA IRON WORKS,
Per G. H. MALTER.
12 GREGORY CONSOLIDATED MIN. CO.,
Per H. W. CHILD, *Assis't Gen'l Man'g.*

Thereupon plaintiff offered in evidence the deposition of George H. Malter; which said deposition was in words and figures as follows:

(Title of Cause.)

Be it remembered that, pursuant to the stipulation hereunto annexed, and on the 15th day of December, A. D. 1884, at my office, in the city and county of San Francisco, State of California, before me, a notary public in and for the said city and county of San Francisco, duly commissioned and appointed to administer oaths, etc., personally appeared GEORGE H. MALTER, a witness produced on behalf of the plaintiff in the above-entitled action, now pending in said court, who, being by me first duly sworn, and then and there examined and interrogated by me upon the interrogatories hereto annexed, testified as follows:

Interrogatory 1. What is your name, age, occupation, and place of residence?

To the first interrogatory he saith: G. H. Malter; 35 years; San Francisco; contractor.

13 Interrogatory 2. Are you acquainted with the parties to the above-entitled action? And, if so, you may state when you became acquainted with them and how long you have known them each respectively.

To the second interrogatory he saith: Have known Starr since May, 1883; have known H. W. Child, the assistant manager of defendant, for these last two years, nearly; have known Jesse Lilienthal, the president of the Gregory Company, about one year.

Interrogatory III. Were you ever connected in business with the above-named plaintiff; and, if so, when, between what dates, what was the firm name, and how was such connection terminated?

To the third interrogatory he saith: Was connected in foundry business with Starr from June 12th, 1883, to March 5th, 1884, the firm name being The Ætna Iron Works. We dissolved partnership, Starr taking the assets and agreeing to pay the debts, on said March 5th, 1884.

Interrogatory IV. If in answer to the last interrogatory you say that you were connected in business with said plaintiff under the firm name of the Ætna Iron Works, you may state if you
14 ever entered into any contract with said defendant for the erection of a mill; and, if so, you may state when you made such contract and whether the same was or was not in writing.

To the fourth interrogatory he saith: We entered into a contract with the Gregory Company, defendant, to build a mill. The contract was in writing.

Interrogatory V. If you say that the said contract was in writing, you will attach the original contract or a copy thereof to your answer to this interrogatory as an exhibit.

To the fifth interrogatory he saith: I produce copy of contract, which is hereto attached, marked "Exhibit 1."

Interrogatory VI. You may state whether or no you ever delivered or caused to be delivered to said H. W. Childs a bill of lumber required for the erection and completion of the concentrating works mentioned in said contract; and, if so, when you so delivered the said bill to said Childs.

To the sixth interrogatory he saith: I gave Child a bill of the lumber required, at my office, in San Francisco, a day or two after signing the contract.

15 Interrogatory VII. When was the lumber necessary for the erection and construction of said mill and called for in the bill you so delivered to said Childs actually delivered upon the ground at Gregory, Montana, where said mill was being erected?

To the seventh interrogatory he saith: The bills hereto attached, marked "Exhibit 2," are, I think, of the lumber contained in the list, and the dates on the margins are the dates of the delivery of the lumber.

Interrogatory VIII. Have you any copy of the bill of lumber you delivered to said Childs or any memorandum thereof? If so, you may attach the same or a copy thereof as an exhibit to this answer.

To the eighth interrogatory he saith: I have no copy of bill of lumber excepting the bills of delivery, which, I believe, contain the list of lumber ordered. The original bill was delivered to Childs.

Interrogatory IX. When was said mill completed and what, if any, acceptance thereof was made by said defendant or any one in its behalf?

To the ninth interrogatory he saith: The mill was completed about the end of February, 1884, but it was not accepted until

16 April 18th, 1884, when it was accepted by Charles Hesse, the superintendent of the company in Montana.

Interrogatory X. If you say in answer to the last interrogatory that one Professor C. Hesse, on behalf of said defendant, accepted said concentrating mill, you may state when and how such acceptance was made, and if in a letter you will attach the same or a copy thereof in answer to this interrogatory.

To the tenth interrogatory he saith: This specifying of objections was agreed upon. I then proceeded at once to do all that the objections set forth, although I knew that some things were not at all what was necessary or required by contract; as, for instance, the matter of screens, which had been made and furnished by the Ætna Company as per plans and specifications, but which the Professor Hesse wanted changed. While we were proceeding to change the same the Professor Hesse said, "Never mind; I don't care to have

them changed. I will crush the ore coarser, and I will change
17 the screens in a different way myself when I find out that it is better." Hesse accepted the mill April 18th, 1884, by letter hereto attached, marked "Exhibit III."

Interrogatory XI. Who, if any one, was the manager of said defendant company in the Territory of Montana at the time of the construction of said mill and its acceptance?

To the eleventh interrogatory he saith: H. W. Child was the acting—the so-called assistant general manager.

Interrogatory XII. If, in reply to the last interrogatory, you say one H. W. Child was the assistant general manager of the said company and its representative in the Territory of Montana during the construction of said mill and at and after its acceptance, you may state whether you had any conversation with said Childs with reference to the acceptance of said mill by said Hesse on behalf of the defendant, or generally concerning the completion of said mill and its acceptance by the defendant; if so, you will state when you had such conversation, who was present thereat, and what was said.

To the twelfth interrogatory he saith: Answered under interrogatory ten.

18 Interrogatory XIII. What objection, if any, did said Childs ever at any time make to you concerning the construction of said mill or its acceptance on the part of the defendant?

To the thirteenth interrogatory he saith: Child said: "I must please Hesse in the construction of that mill."

Interrogatory XIV. What, if anything, did you do with your interest in said contract and the indebtedness created by reason of the construction of said mill, and who, if any one, is now the owner and holder of such indebtedness?

To the fourteenth interrogatory he saith: I assigned all my interest to L. M. Starr. He is now the owner of the indebtedness.

Interrogatory XV. If you know any other matter or thing relative to the issues in this case and material to the plaintiff you may declare the same fully and at large as if thereunto particularly interrogated.

To the fifteenth interrogatory he saith: Charles Hesse ran only one-half the mill and did not want to start the other half. After one-half the mill had been run for awhile day and night, it was
19 run only during daytime, there not being sufficient ore to keep it supplied. The half the mill running daytime only, or twelve hours, was equivalent to working the mill to one-fourth of its capacity. If the entire mill had been started at once and run day and night to its full capacity upon the few tons of ore which the company had on hand when the mill started, it would have been necessary to shut down the mill in a few weeks entirely—that is, as soon as the ore dump, which was very small, had been worked up. Therefore Hesse concluded to work only as much ore per day as the mine could supply per day, it being cheaper to keep the mill running than to keep starting and stopping it. The mill first started running about February, 1884, and the delay in the completion of

the mill was caused in a great measure by the changes which Hesse continued to order of us to be made in the construction and design of the mill. He changed the size of the rolls after we had partly made them at the foundry in this city. Thus he delayed the work here. He changed the construction of the building there and added
20 slime concentrators and slime sizing apparatus which were not included in our original contract and for which the defendant paid us an extra amount of money and for which an extra amount of lumber was needed, a list of which is attached hereto, marked "Exhibit IV." This lumber was not delivered until the dates specified in the margins of the bills, Exhibit IV. H. W. Child ordered us to make whatever changes or alterations or additions Charles Hesse required of us. If extra work was done by us at the request of Charles Hessee, Childs said that the defendant Gregory Consolidated Mining Co. would pay us for such work in addition to the stipulated contract price. Both Child and Lilienthal told me that when the mill was acceptable to Hesse it would be acceptable to the company, defendant. I made a written agreement with Lilienthal with regard to the changes required by Hesse previous to the accepting of the mill. I believe a letter-press copy of that agreement is in the hands of Sanders & Cullen, attorneys for the plaintiff herein. The original of said agreement is in possession of defend-
ant.
21 (Signed) G. H. MALTER.

EXHIBIT No. 1.

For copy of Exhibit No. 1, being memorandum of agreement between the "Ætna Iron Works" and the Gregory Consolidated Mining Company, see page —, beginning at line —, and ending on page —, at line —.

EXHIBIT No. 2.

Exhibit No. 2 being a bill of lumber bought of Jesse Patterson, Jefferson City, Montana, directed to the Gregory Mining Co., dated December 1st, 1883, with marginal dates for the several items contained therein, running from August 17th to October 8th, 1883.

EXHIBIT No. 3.

GREGORY, *April 18th*, 1884.

Mr. C. B. Malter, Ætna Iron Works, San Francisco.

D'R SIR: I take the liberty to inform you that the concentrator built here by the Ætna Iron Works is now completed *by the Ætna Iron Works is now completed* and therefore it is not necessary
22 for your agent, Mr. E. W. Wild, to remain here any longer. Same time I express you my entire satisfaction with the work done here. The new concentrator undoubtedly ranks among the best-arranged works of its kind. Although contract calls only for 80 tons of raw ore to be treated, I can easy double that

amount and still make high-grade concentrates and clean waste, which is quite a success, taking into consideration that the ore here is very hard to treat. The building is substantially and well built; the machinery of first-class workmanship.

I remain y'rs respectfully,

C. HESSE,
*Sup't Gregory Smelter.*

EXHIBIT No. 4.

Exhibit No. 4 consists of a second statement for lumber, likewise dated December 1, 1883, addressed to the Gregory Mining Company, bought of Jesse Patterson at Jefferson City, Montana, with marginal dates opposite the several different items thereof, running from and between October 19th, 1883, to December 19th, 1883, inclusive.

Said deposition was thereupon read in evidence, sub-
23 ject to the following objections to specific questions and answers therein as numbered, which said objections were then and there and prior to the reading of the several questions or answers by defendant duly interposed, passed upon by the court, and by it overruled, and exceptions to said several rulings duly then and there and at the time entered in the minutes of the judge of said court as follows, to wit:

First. To the reading of question and answer numbered "6" in said deposition defendant objected as being immaterial, in that the contract did not provide for a delivery of said or any bill by Malter to said Child at any time; which said objection was by the court overruled, and defendant's exception to said ruling at the time entered in the minutes of the judge.

Second. To the reading of answer numbered "7" in said deposition defendant objected, for the reason that it is merely hearsay; that it is not responsive to the question, in that it does not refer to the lumber contained in the bill handed to him by Child; which said objection was by the court then and there overruled, and defendant's exception thereto entered in the minutes of the judge.

24 Third. To the reading of answer numbered eight in said deposition defendant objected, for that it is not responsive to the question, in that it refers to other bills of lumber than that inquired of; which said objection was overruled and exception entered in the judge's minutes.

Fourth. To the reading of question numbered nine in said deposition defendant objected because it does not refer to any person authorized to act in behalf of defendant in accepting and because no proof of any agency had been heretofore introduced. (Objection overruled & exception entered.)

Fifth. To the reading of the answer to question numbered nine in said deposition defendant also objected, for the reason that no authority had been heretofore shown in said Hesse to make an acceptance in behalf of this defendant, which said objection was by the court overruled; to which ruling defendant then and there duly excepted.

Sixth. To the reading of the letter of acceptance referred to in

answer to interrogatory numbered ten defendant objected, for the reason that no proof has been introduced of any authority of
25 Hesse to act for or bind the company defendant in the acceptance of said mill, which said objection was by the court overruled; to which ruling defendant then and there duly excepted.

Seventh. To the reading of the twelfth question and answer of said deposition defendant objected, for that said question is premised upon an acceptance and none binding upon the company has been shown; which objection was overruled and duly excepted to.

Eighth. To the reading of answer to question numbered fifteen defendant objected severally as follows: To lines — to —, because the same is hearsay; also because the same is a mere opinion and no showing that he is an expert upon that subject; to lines — to —, because the same states a conclusion and opinion and no showing theretofore made that but one-half of said mill had been used; lines — to — objected to, because the same is a mere opinion and no showing that he was an expert; lines — to — of page — of said answer objected to, because immaterial; in that contract provided for such changes, and therefore they constitute no excuse for
26 delay, and, further, because the same merely states an opinion as to the cause of delay; lines — to — of page — and lines — and — of page — of said answer, because no authority had been shown — either Child or Lilienthal to accept or to redelegate authority to accept said mill, and, further, because the same is immaterial, in that it does not state an acceptance by Hesse would constitute an acceptance by the company, but only that if it proved acceptable to Hesse, then the company would accept the mill. Each and all of which above-enumerated objections were by the court then and there overruled, and said rulings then and there duly excepted to by the defendant.

That thereupon plaintiff offered in evidence a certain letter in words and figures following, to wit:

To the president and to the manager of the Gregory Consolidated Mining Company.

GENTLEMEN: Whereas Professor Hesse, your superintendent, has raised a number of objections to the acceptance of the concentrating mill constructed by the Ætna Iron Works for your company
27 under a contract made July 28th, 1883, I hereby agree to make the changes demanded by Prof. Hesse, as per a bill of objections submitted to me, your company to pay the extra bill of the Ætna Iron Works for three (3) percussion tables and duplicates of machinery furnished; which bill, it is understood, does not exceed one housand (1,000) dollars, and you agree to accept one of the two Blake crushers asked for by Prof. Hesse, after the next payment of ten thousand ($10,000) dollars due to the Ætna Iron Works, as per contract with you, has been made by you.

(Signed) ÆTNA IRON WORKS,
By G. H. MALTER.

Accepted.

GREGORY CONSOLIDATED MINING CO.,
Per J. W. LILIENTHAL, *President.*

Which said letter was thereupon admitted and read in evidence by the court.

Whereupon plaintiff offered in evidence the said deposition of Charles Hesse hereinbefore referred to; which said deposition was in words and figures following, to wit:

Title of Cause.

28 Be it remembered that, pursuant to the order hereto annexed and on the 29th day of November, A. D. 1884, at my office, in the city of Butte, county of Silver Bow, and Territory of Montana, before me, Charles S. Warren, a notary public in and for the Territory of Montana, duly appointed and commissioned to administer oaths, personally appeared CHARLES HESSE, witness produced in behalf of the plaintiff in the above-entitled action, now pending in said court, who being by me first duly sworn, was then and there examined and interrogated by me in accordance with the annexed list of interrogatories, there being no counsel for either plaintiff or defendant present, when the following interrogatories were propounded and the following answers returned as follows, to wit:

Interrogatory I. What is your name, age, occupation, and place of residence?

Ans. Charles Hesse; 36 years; mining engineer; Gunderson P. O., Silver Bow county, Montana.

Interrogatory II. Where were you and in what were you engaged from the first day of July, A. D. 1883, to the first day of May, A. D. 1884?

29 Answer. I was in the service of the Gregory Consolidated Mining Company, having charge of their concentrating and smelting works at Gregory, Jefferson county, Montana Territory.

Interrogatory III. Are you acquainted with a concern known as the Ætna Iron Works? If so, you may state what, if any, agreement was made between said Ætna Iron Works and the above-named defendant, The Gregory Consolidated Mining Company, concerning the erection of a concentrating mill at Gregory, Jefferson county, Montana, during the month of July, A. D. 1883. State all you know concerning the same.

Answer. I am acquainted with G. H. Malter and E. B. Rogers, of the Ætna Iron Works of San Francisco. Mr. Harry W. Child informed me that he had made a contract with the Ætna Iron Works for building a new concentrator of 75 tons daily capacity, and that I should make the general plans of it and send them to Mr. Malter, in San Francisco, immediately, which I did.

Interrogatory IV. Was the agreement for the completion of such mill in writing? And, if so, you may state when, if at all,

30 said Ætna Iron Works entered upon the work of constructing said mill, when it was completed, the general character of the mill, and what machinery was placed therein by plaintiff.

Answer. I don't know if the contract was in writing. I only saw

a copy of it. I think the Ætna Iron Works commenced work on the new mill some time in August, 1883. As Harry Child and myself had decided to have the new mill built on the same place where the old one stood, Mr. Child had the millwright of the Ætna Iron Works, Mr. E. B. Wild, first remove the old mill from the ground, which took him some two weeks. I think the new mill was started up February 21st, 1884, and had the following machinery in the building, viz: Two rock-breakers, 4 sets of crushing rolls (each of 36 in.), 2 elevators, one large car elevator, 2 sets of revolving sizing-screens, 12 jigs, 3 pointed boxes of iron, 2 Rittinger shaking tables of iron and covered with rubber cloth, and the necessary machinery to drive it.

Interrogatory VI. After the completion of said mill who, if any one, accepted the same on behalf of said company, and how
31 was such acceptance made?

Answer. Some time after the mill was completed Mr. Malter asked me to make out a written acceptance of the mill and hand it over to Mr. Wild, which I did. Such acceptance bears the date of April 18th, 1884.

Interrogatory VII. Who, if any one, instructed you to accept said mill, or what authority did you have as superintendent to accept the same?

Answer. I did not think it necessary to obtain the authorization of anybody to furnish such a certificate of acceptance to Mr. Malter.

Interrogatory VIII. Are you acquainted with one H. W. Child? And, if so, you may state what connection with said company or what official position he held therein from the 1st day of July, A. D. 1883, to the first day of May, A. D. 1884.

Answer. I am acquainted with H. W. Child. From July, 1883, to May, 1884, he held the position of assistant general manager of the Gregory Consolidated Mining Company.

Interrogatory IX. At on or about the day of your accept-
32 ing said mill did you have any conversation with said Child relative to your having accepted the same? If so, you may state what was said in such conversation and what objections, if any, he made concerning your acceptance of the mill.

Answer. Shortly after having given to Mr. Malter the above-mentioned acceptance I showed Mr. Child a copy of it, and, as he did not make any objection to it, I considered it all right.

Interrogatory X. Prior to your accepting said mill, what examination or trial had you made of the same, and what was the result thereof, as to the suitableness and efficiency and as to the construction and completion in accordance with the contract under which it was built?

Answer. I ran the mill for about a month or more and had the Ætna Works Co. make several changes in it, which they did; for instance, I had them put in two new crushers of another pattern and various other small changes which I considered necessary to have the mill built according to the contract.

Interrogatory XI. How long have you been engaged in
33 business as a mining engineer, and from what school, if any,

did you graduate or *to* what school did you study your profession?

Answer. I have been in the mining business since 1866, leaving the mining school of Freiberg, in Germany, as a graduate to the government service in the year 1870. Since that time I have been engaged in practical mining in different places of Europe and America.

Interrogatory XII. What, in your judgment as a mining engineer, is about the actual capacity of said concentrating works *per diem?*

Answer. When running in full I estimate the capacity of the new concentrator at Gregory to at least 120 tons per day. I estimate it to that amount for the reason I never got enough ore from the mine to run it to its full capacity.

(Signed) C. HESSE.

That said deposition was by the court admitted and by plaintiff read in evidence, subject, however, to the following objections to specific questions and answers therein as numbered; which said objections were each and all then and there and prior to the reading
34 of the said several questions or answers by defendant duly interposed, by the court passed upon, and overruled; which said rulings were then and there and at the time duly excepted to severally by this defendant, and which said exceptions were duly then and there noted and entered in the minutes of the judge of said court as follows, to wit:

I. To question and answer numbered "6" defendant objected because no authority — shown in Hesse to accept said mill for defendant and no authority has been shown in Child to himself accept said mill or to redelegate the power to accept the same so as to bind the defendant; also to that portion containing statements of H. W. Child, because the same is but the declaration of an agent and there is no showing of time or place where made, or that they were made while acting within the scope of his authority; also because no authority — shown in Child to act, so that his silence would operate as an estoppel upon the company.

35 II. To answer to question numbered "12," in that the same is not responsive to said question, as merely an estimate is asked for, and because the reason assigned is no reason for an estimate, and for both reasons immaterial.

Whereupon the plaintiff rested his case, and the foregoing constitutes and was and is all the evidence introduced by him to support his said case, and no other or further evidence was introduced therefor.

Thereupon, and at the time plaintiff closed and rested his said case and stated that he had no further evidence to offer, this defendant made and filed its motion for a nonsuit; which said motion was in words and figures following:

Title of Cause.

Now comes the defendant, The Gregory Consolidated Mining Company, in the above-entitled cause and moves the court, the

plaintiff having closed his evidence therein, that said plaintiff be nonsuited and his said action dismissed, for the reasons following:

36 I. That by said evidence plaintiff has failed to show or prove facts sufficient to constitute a cause of action against this defendant, in this, to wit: That by the terms of the contract proven it was provided that the sums sued for should be payable and due a certain period after the acceptance of said mill by this defendant, and that no acceptance of said mill by defendant or any person legally authorized to accept the same for defendant was proven.

II. That by said evidence plaintiff failed to prove a cause of action against this defendant, in that said contract proven provided for a completion of said mill on or before four months after the date of said contract; that time was of the essence thereof, and that the proof showed that said mill was not completed within the time specified and no legal excuse under the contract therefor shown.

III. For that plaintiff has failed to prove any cause of action against this defendant.

E. W. & J. K. TOOLE &
WM. WALLACE, JR.,
*Att'ys for Defendant Gregory Company.*

37 Which said motion was thereupon and at the time argued by counsel and by the court heard and overruled; to which said ruling of the court this defendant then and there duly excepted, and which said exception was then and there duly noted and entered in the minutes of the judge of said court.

Whereupon this defendant, to support its case, offered the following, among other, testimony, to wit:

H. W. CHILD, who being sworn, was called as a witness, and among his evidence and testimony identified a certain bond and certain letters as being the bond and letters severally hereinafter described and referred to; that thereupon said bond was offered in evidence; which said bond was in words and figures as follows:

"Know all men by these presents that we, Malter & Starr, as principal, and L. M. Starr, as surety, are held and firmly bound unto the Gregory Consolidated Mining Company, a corporation duly organized and existing under and by virtue of the laws of New York, in the penal sum of twenty thousand (20,000)
38 dollars; for the payment of which sum we hereby bind ourselves, our heirs, administrators, successors, and assigns.

Signed and sealed at the city and county of San Francisco, State of California, this 28th day of July, A. D. 1883.

The condition of this obligation is such that whereas said Malter & Starr have this day executed a contract by the terms of which they agree to construct a concentrating mill for said Gregory Consolidated Mining Company, at Gregory, in Montana Territory; and whereas said Gregory Consolidated Mining Company are by the

terms of said contract to pay said Malter & Starr the sum of twenty thousand (20,000) dollars upon receipt of a bill of lading showing that the machinery specified in said contract has been shipped from San Francisco:

Now, therefore, if said Malter & Starr shall well and truly perform all the conditions of said contract on their part to be performed, and shall repay said sum of twenty thousand dollars to said Gregory Consolidated Mining Company in case of non-performance, then this obligation shall be void; otherwise it shall remain in full force and effect.

39 (Signed) MALTER & STARR.
L. M. STARR."

And was thereupon admitted and read in evidence.

That H. W. Child further testified as follows:

"I do not know just when I received the statement of that lumber referred to in the contract; this defendant had nothing to do with this lumber business. I acted in that as the agent of the Ætna Iron Works, as they had no agent here to attend to it—that is, in purchasing the lumber or any supplies wanted. As near as I can remember, the first shipment of machinery for the mill was made by them in the last few days of October. The lumber was there on the ground and building constructed long before the machinery arrived. The mill building for which the lumber was to be used and was used was completed, ready to receive the machinery, some time in the month of October, 1883, or before then, as near as I can recollect. We started the mill to running about the 20th of February, 1884. The mill would run two or three hours and then stop an equal length of time on account of breakages because of defective machinery."

40 Hereupon defendant asked of said witness Child, I will ask you to state whether at the time of the completion of the mill building the machinery to be furnished under the contract was ready to be put into it or had arrived either at Helena or at Gregory. Said question being objected to by plaintiff for the reason that there was no stipulation in the contract that it should arrive at any given time, said objection was by the court sustained; to which ruling defendant then and there duly excepted.

That H. W. Child, on cross-examination, testified that at the time of the building of the mill in controversy he was the general manager in the Territory of Montana for the defendant company; that he was specially authorized to have said mill constructed by a letter from the president of the company; that the mill, from the time it started, had been run by the company off and on up to the present time; that Charles Hesse, whose deposition was read by the plaintiff, was at the time of the building of said mill his, Child's, representative at the works.

41 Whereupon defendant offered in evidence a certain letter, theretofore identified by the witness Child as a letter written by him to the Ætna Iron Works while he was acting for them in

the purchase of lumber and other supplies; which said letter was in words and figures as follows, to wit:

SEPT. 18, 1883.

Ætna Iron Works, San Francisco.

GENTLEMEN: I must warn you that I have repeatedly wired you to commence your shipments to the mine. I have so wired you knowing the difficulties we shall have to contend with in getting the freight from the city to the mine. There are no available wagons here to transport freight and the prices will be enormous, and I cannot agree to deliver your freight. So, also, the Oregon steamers are heavily loaded, and it is hard work to get them to take machinery. You must remember winter starts in early here and you have a big undertaking before you. Wild has the building up and wants any parts of the machinery you can ship, as he is ready for
42 it and can put it in place. I can move small lots of machinery to the mine better than I can large lots. Why can you not ship the crushers, rolls, &c., immediately; also any parts you may have ready, and not hold everything until you have completed the order. Please ship and mark as follows (marking on the machinery the weights): G. C. M. Co. ac. H. W. Child, Helena, M. T.

Yours very truly, H. W. CHILD, *Manager.*

To the introduction of which plaintiff objected. Said objection was by the court sustained, and defendant then and there duly excepted.

Whereupon defendant also offered in evidence four certain letters, each of which said letters had been theretofore identified by the witness Child as letters written by one Charles Hesse, being the same person referred to in said contract, while said Hesse was watching the construction and completion of said mill under said contract; which said letters were in words and figures severally as follows, to wit:

GREGORY, *Feb.* 13, 1884.

Mr. H. W. Child.

43 D'R SIR: To-day the weather is not so cold and so I made a trial again to run the concentrator, but it did not work. The 2½-feet revolving screen below 11 rollers did not give the ore out—did not discharge at all—as it is made of wire screen, so I have sent Mr. Wild over to Wickes and got some perforated sheets, as we have not such number (5 min.) here. The sheets are here now and it will them take to-day and up to to-morrow noon to make changes, as the same time the spouting of said screen has to be changed. We are lowering the speed of all the revolving screens and making some change in the jiggs. To-morrow noon, I suppose, we can try it again. That means if we get the ice out of the jigger boxes in the meanwhile. I wrote Mr. Malter several times no wire screen shall be put on the revolving screens, but he did not pay any

attention to these trivial things, as he calls it. I also wrote him to send 3 sheets of perforated screen more with ½ m. n., as ⅜ m. n., most probably, will be too coarse, but he did not pay any attention to it. I am getting very much tired of the way this com-
44 pany has done business here. Pretty near everything has to be changed. Good is only what has been made here. Yesterday we had to drill a ½-inch hole into the one shell of first rollers and screw a steel block 1½ in. long in to close a cave in the shell. I wrote you yesterday that the rigid arrangement on rollers does not work, and we had to put the rubber puffer from the other side in. Agitator in settling tanks has been stopped, as it agitated too much fine galena into the creek. A manufacturing company which is making experiments on concentrating should have a sufficient supply of different kinds of perforated screens and wire screens, pulleys of different sizes, etc., on hand for change. We have nothing of that kind here at all, and if it is not made exactly as the ore wants it—and that is only one way, which has to be found out by experiments—concentrator will not work. That means we will not get a pound of ore out or through. Rollers do not crush satisfactory yet, although rubber puffers are screwed tight to their utmost capacity; will have to put washers between screws and puffers.

45 Yours respectfuly, C. HESSE.

2.

GREGORY, *Feb.* 23, 1884.

Mr. H. W. Child.

DEAR SIR: I have made a report about the work done by Ætna Comp. on concentrator, but as Mr. Bach wrote me that you were coming out yesterday, have not sent it to you, I will keep report till you come out. Concentr. works very slow on acc. of the crusher, and the whole machinery is not very satisfactory, as you will see by report and yourself. The crusher No. 1 is broken; the big jaw, about 3″ thick, broke right into 2 parts last night. I took that jaw out (the jaw, not the die) from the second crusher and put it into the one we are using now, but it does not fit very well, as the two crushers are not of the same pattern, and I am afraid it will break also. Very poor machinery delivered by the Ætna Works.

Yours resp'tf'y,
(Signed) C. HESSE.

3.

GREGORY, *Feb.* 26, 1884.

Mr. H. W. Child, ass. man'g Gregory C. M. Co.

46 D'R SIR: Having run new concentrator for several days now, I formed myself an idea of the work done by it and report it to you. The general plant is well adapted to treat these ores here. The building is substantially and well built, but the machinery is not sat-

isfactory, as you will see. The crusher, on account of its peculiar jaw movement, works but very slow, and even with one inch opening does not reach the capacity of an ordinary Blake crusher of the same size. The shoes and dies are fastened to the jaws by bolts going right through; the heads of these bolts wear out almost instantly and cause the die to wear out, too. While with an ordinary Blake crusher it takes but one hour to put new shoes and dies in, it will take with this crusher from 8 to 10 hours; therefore will be a good deal of unnecessary expense to the comp. The jaw of crusher No. 1 broke right in 2 parts on acc. of bad castings. From the crusher the ore was to be sized by a shaking screen, but as it did not work at all we took it out. From there it goes to the 26″ coarse rollers.
47 Also, these rollers work very slow on acc. of the peculiar way to drive them, as you will see with the other rollers; the one piece of rubber puffer is not strong enough for the rollers; our old rollers had 2 of such puffers. From these rolls the ore was sized by a shaking screen again. This we took out and replaced it by a revolving screen from the old concentrator; this revolving screen has but 2½ feet diam., which is too small. The fine stuff from there goes to the jigger revolv. screens, the coarse is elevated by a bucket elevator to the second rollers; the elevator is good. The second rollers are of the same size, 26″ diam.; had no rubber puffer, but were rigid. This arrangement did not work at all, as the slightest bit of ore too much stopped the rollers altogether, so I took the rubber puffer from coarse rollers on the other side and put it onto these rolls. The rolls work now, but they do the same as the other rollers—do but very little work—so that the ore, most, is elevated again, passes through the rollers again, is elevated, and so on, and but very little ore is crushed fine enough for further treat-
48 ment. The cause of this small work lies in two places: first, the rubber puffers are not strong enough, and, second, by the peculiar way to drive these rolls. You cannot screw them together so that they will do any work; they will simply stop, and do it even now often enough. The pull-y on main shaft for the one-half of these rolls is 18 inches, and this pulley drives in a distance of 21 feet; a 6-feet pulley where rolls *is* attached to by such a peculiar kind of engineering never will drive any rolls to crush quartz as we have here. What little ore finally is crushed fine enough to pass a 5 m. n. screen goes to the revolving (sizing) screen for jiggs. These revolving screens have 3½ foot diam. and if they were made better would do the work well, but there is no receiving cone on the upper end of the screens; therefore the ore drops mostly on the floor instead of into the screens. The substituted pieces of sheet iron placed in instead of the cone were no account and we had to take them out again. The jiggs are good and will do their work well if the Ætna Comp. only would provide oil cups for the eccentrics. The finest ore goes to the settling tanks and is
49 there separated into 3 different sizes, which go to 2 shaking tables. The settling tanks are made of iron and work- well after we took the agitators out. The shaking tables are of a very poor make. There is no way to regulate them and we have to work

them over entirely. The concentrates are hoisted to the roaster floor by a car elevator 60 feet high. This elevator is not to my satisfaction, as it runs very slow, is hard to stop on the right place, and has not even a safety spring on the cage. I remark that the other half of the concentrator will require a good deal of work to be done more before it can be used, and there are no settling tanks and tables here for the same.

Yours respt.,
(Signed) C. HESSE.

4.

GREGORY, *Feb.* 27*th*, 1884.

Mr. H. W. Child.

D'R SIR: Concentrator is stopped; we putting in new shoes & dies in crushers. Please provide that the broken jaw is replaced.
50 The one we have in the crusher now belongs to the other one, and as it does not fit this crusher (both crushers are not exactly alike—a very nice arrangement) the shoes and dies wear out like lightning. Also please order at once enough shoes and dies for crusher to keep us running. It takes 4 sets per month and per crusher. It took us hours to change shoes & dies. The rope on car elevator slipped last night. The cage went down and mashed the car all to pieces—something what could not have happened if there was a safety spring on the cage. The average stopping time now is about 6 hours in 24 hours for repairing, cleaning out blocked-up rollers, screens, and elevators. How much time this will be after the machinery is worn somewhat I cannot tell, but I am afraid it will double. I have 2 carpenters at work to make an elevator for table concentrates and for repairs. I send you a sketch of the dimensions of the broken jaw. Can you not induce the Ætna Iron Works to take their 2 crushers out and send us instead of them 2 7 x 10 Blake crushers, old style, cast-iron frame? This would be a good deal cheaper for our company at the end
51 than having all these expenses in steel jaws and the stopping of the mill.

Yours resp.,
(Signed) C. HESSE.

To the introduction of each of which said letters plaintiff then and there objected; which said objections were by the court severally sustained and said letters not admitted in evidence; to which said several rulings of the court the defendant then and there duly excepted.

Hereupon the defendant rested.

Whereupon, the evidence having been concluded — the case argued, the court gave, subject to this defendant's objection, as hereinafter stated, the following instructions to the jury:

*Plaintiff's Instructions.*

I. If you believe from the evidence in this case that on or about the 28th day of July, 1883, the defendant The Gregory Consolidated Mining Company entered into a contract with the Ætna Iron Works to construct a concentrating mill at its Gregory mine, in the county of Jefferson, Montana Territory, substantially as is alleged in the complaint, and if you also find from the evidence that the Ætna
52 Iron Works constructed such concentrator as provided in said agreement, and that thereafter plaintiff became the owner of the indebtedness resulting therefrom, then you should find for the plaintiff and assess his damage at the sum of twenty thousand dollars, with legal interest thereon from the date that the same became due under the contract, less any offset to said demand which the defendant The Gregory Mining Company may have proved to your satisfaction.

II. The contract calls for the completion of the concentrator in four months from the date of the contract, providing the lumber for the same was placed upon the ground where the concentrator was to be built within forty days from the date at which a bill for such lumber was placed in the hands of H. W. Child, ass't general manager of the defendant The Gregory Consolidated Mining Company. This stipulation of the contract is therefore conditional only, and unless the lumber for the building was delivered on the ground within (40) forty days after the bill therefor was placed
53 in said Child's hands, then there was no obligation on the part of plaintiff to complete said concentrating mill within four months from the date of the execution of the contract, but, as in other cases where the time is not limited, the law would impose an obligation upon them to complete it within a reasonable time.

III. If you believe from the evidence that the lumber necessary for the construction of said concentrating mill was not delivered upon the ground where said mill is built within forty days after the delivery of the bill therefor to said H. W. Child, then the defendant would not be entitled to recoup damages for the use of said mill after the expiration of four months from the date of the contract out of the sum due and owing for the construction of such mill, if, considering the nature of the work, the season of the year, and all of the surrounding circumstances, the contractor, the said Ætna Iron Works, completed said concentrating mill within a reasonable time.

54 IV. If you should be of opinion from the evidence that the concentrating mill referred to in the pleadings and contract was not erected and completed within a reasonable time, due regard being had to all of the surrounding circumstances, then the defendant The Gregory Consolidated Mining Company would be entitled to recoup out of any sum you may find due the plaintiff on account of the construction of said mill the actual damage which it has sustained, if any, by reason of the failure of the said Ætna Iron Works to so complete the same within a reasonable time. If you should find said defendant entitled to any offset for damages, it is only entitled

to actual damages or the actual loss it has sustained by reason of such failure to complete said concentrator within a reasonable time. You will therefore, in determining this question, first inquire what was a reasonable time in which the said contractor, the Ætna Iron Works, should have completed said mill and put the same in running order, providing you find the lumber was not furnished in the time specified. You will then
55 inquire what actual damage the defendant suffered after the expiration of such reasonable time and between that and the time when the mill was put in a condition to run and commenced to run. If you find that the mill was erected for the purpose of concentrating ores from defendant's, Gregory, mine, then, in connection with the subject of damages to the defendant, you are authorized to inquire as to the condition of said mine—the amount of ore that defendant did or could have gotten out of said mine for working in said mill—and if you should find therefrom that defendant did not have actual use for said mill prior to the time it commenced to run, then defendant was not damaged by the failure on the part of the contractor to complete said mill even if the same was not completed within a reasonable time, and you ought not to find any damages on account thereof. The question of the completion of the mill within a reasonable time does not enter into the case, unless you find from the evidence that there was a failure to furnish the lumber as provided in the contract.

56 V. A certificate or letter of acceptance, signed by one C. Hesse, has been introduced in evidence. If you believe from the testimony in this case that at the time of the making of this certificate that the said C. Hesse was an agent of the said defendant and authorized to make the same, and that in the making and delivery thereof the said Hesse was acting within the scope of his authority as such agent, then the making and delivery of said certificate was an admission on the part of the said defendant that the said concentrating mill was completed in accordance with the contract, and that the contractors, the Ætna Iron Works, were entitled to payment therefor in accordance with the terms of the contract under which it was erected.

*Defendants' Instructions.*

All provisions of a written contract must be found in the contract itself, and verbal understandings between the parties can form a part of such contract. The defendant is not entitled to re-
57 coup any damage out of the contract price of said mill, which is not yet due.

Under the contract sued on it was and is necessary for plaintiff to prove by a preponderance of evidence his entire fulfilment of the conditions of the contract or a waiver of the performance by the defendant. The mill and machinery having been placed upon realty, the mere taking possession of the property before or after completion would not operate nor would the continuous use of it operate as an acceptance under the contract, and an acceptance of the property you must find before any recovery can be had under

this contract; but you may take into consideration the fact, if the evidence shows such fact, the commencement and continued working of the mill by the defendant in determining from the evidence whether or not there was an acceptance of the mill.

The jury are further instructed that any contract made by an agent whose interests are for any reason opposed to his princi-
58 pal is voidable at the election of the principal upon the discovery of the fact; and if you find that the plaintiff or his copartner at any time agreed with the agent of the defendant that he was to receive from them a commission under the contract, and that afterwards this matter came to the knowledge of the defendant, then the defendant was at liberty either to accept the contract and the benefits to accrue to the agent under it or to declare it void, and if they see fit to affirm it they are entitled to have the amount to be received by their agent credited to them upon the amount due on the contract; and if you find that it was to be deducted from the last-named payment under the contract, then you should credit it upon the amount sued for.

The defendant here, as shown by the pleadings and proofs, is a foreign corporation having a managing agent in this Territory. Corporations can act only throughtheir agents. All officers of a corporation, from president down, are in law but agents of the cor-
59 poration. In considering whether the act of Hesse in accepting the concentrator was within the scope of his authority you are entitled to consider the contract between the parties, the relation of Hesse in connection therewith, what was said and done with reference thereto, and the action of the company in running said mill; and if you find therefrom that Prof. Hesse had authority to make such acceptance, or that the same was subsequently ratified by the defendant The Gregory Consolidated Mining Company, then the defendant was bound thereby, and the consideration for the building of said mill, or, rather, the two payments here in suit, became due respectively in sixty and ninety days after the date of such payments, and you should find for plaintiff for the amount of such payments, together with interest thereon, at the rate of ten per cent. per annum, from the date that such payments respectively became due, less any amount you may find that defendant is entitled to recoup out of such amount as damages.

Whereupon this defendant offered a certain instruction in words and figures as follows:

60 The jury are instructed in the above-entitled action that time in the contract sued is of the essence thereof, and that if you find that the failure to fulfill the contract in time was without fault of the Gregory Consolidated Mining Company, then plaintiff cannot recover and you must find for defendant.

Which said instruction was by the court refused to be given; to which said refusal this defendant then and there duly excepted.

Whereupon a verdict was rendered for the plaintiff upon a submission of said cause, and thereafter, on the 15th day of March, 1886, a judgment was rendered in favor of plaintiff and against said defendant as follows:

Title of Cause.

This cause came on regularly for trial on the 15th day of March, A. D. 1886, that being one of the days of the March term of the said district court, Messrs. Sanders, Cullen & Sanders appearing as counsel for the plaintiff, and Messrs. E. W. & J. K. Toole &
61 William Wallace, Jr., appearing as counsel for the defendant.

A trial by jury having been expressly waived by the counsel for the respective parties and the said counsel having filed a stipulation with reference to the judgment to be entered in said cause, the same was, in accordance with the terms of the stipulation, heard by the court, and the proof in said stipulation referred to was duly examined and considered by the court, and after due deliberation thereon, the court delivered its finding and decision and orders that judgment be entered in accordance therewith. Wherefore, by reason of the law, the stipulation, and the finding aforesaid, it is ordered and adjudged that the said Lewis M. Starr, the plaintiff, do have and recover from the Gregory Consolidated Mining Company, the said defendant, the sum of twelve thousand seven hundred sixty-eight dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action,
62 amounting to the sum of thirteen $\frac{65}{100}$ dollars.

Judgment rendered March 15, 1886.

Attest: B. H. TATEM, *Clerk*,
By C. G. REYNOLDS, *D. Clerk*.

And for assignment and specification of errors which this defendant intends to rely on he presents the following:

First. The court erred in overruling defendant's objection to those questions and answers in the deposition of George Malter numbered severally as follows:

Question and answer No. 6, answer No. 7 and No. 8, question No. 9, answer No. 9, letter of acceptance mentioned in answer No. 10, question and answer No. 12, line — to —.

Second. The court erred in overruling defendant's objection to those questions and answers in the deposition of Charles Hesse, numbered as follows: Question and answer No. 6, answer to question No. 12.

Third. The court — in overruling defendant's motion for a nonsuit.

63 Fourth. The court erred in sustaining plaintiff's objection to questions set forth in lines —, p. —, to line —, p —.

Fifth. The court erred in sustaining plaintiff's objection to the introduction of the letter from Child to Ætna Iron Works.

Sixth. The court erred in sustaining plaintiff's objection to the introduction of the letters from Hesse to Child, numbered 1 to 4.

Seventh. The court erred in refusing to give defendant's instruction numbered one to the jury.

The foregoing is hereupon agreed as the statement upon appeal in the above-entitled action.

SANDERS, CULLEN & SANDERS,
*Attorneys for Plaintiff.*
E. W. & J. K. TOOLE & WM. WALLACE, JR.,
*Attorneys for Defendant.*

And on the 14th day of August, 1886, the defendant The Gregory Consolidated Mining Company filed its notice of appeal in words and figures as follows, to wit:

64 Title of Cause.

To the clerk of said district court and Messrs. Sanders, Cullen & Sanders, attorneys for said plaintiff:

You are hereby notified that the defendant in the above-entitled action hereby appeals to the supreme court of Montana Territory from a judgment made and entered in favor of the said plaintiff and against said defendant in the above-entitled action in the said district court of the third judicial district of Lewis & Clarke county, Montana Territory, on the 15th day of March, 1886, in the sum of twelve thousand seven hundred and sixty-eight dollars damages and eleven dollars and fifteen cents costs and from the whole thereof.

Service of the foregoing notice accepted and copy waived this 13th day of August, 1886.

SANDERS, CULLEN & SANDERS,
*Att'ys for Pl'ff.*

65 And thereafter and on the 14th day of August, 1866, the defendant The Gregory Consolidated Mining Company filed its undertaking upon appeal; which said undertaking was in words and figures following, to wit:

Title of Cause.

Whereas the defendant in the above-entitled action is about to appeal to the supreme court of Montana from a judgment made and entered against him in said action in the said district court in favor of the plaintiff in said action on the 15th day of March, A. D. 1886, for twelve thousand seven hundred and sixty-eight dollars damages and eleven dollars and fifteen cents — of suit:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents and freeholders of the county of Lewis & Clarke, Territory of Montana, do hereby jointly and severally undertake and promise on the part of the said appellant
66 that said appellant will pay all damages and costs which may be awarded against him on an appeal or on a dismissal thereof, not exceeding three hundred dollars; to which amount we acknowledge ourselves jointy and severally bound.

And whereas the defendant is further desirous of obtaining and procuring a stay of execution and proceedings under the said judgment: Now, therefore, in consideration of the premises and of

such stay, we do further jointly and severally undertake and promise in the further sum of twenty-seven thousand dollars, being double the amount named in the said judgment, to the effect that if the said judgment so hereby appealed from or any part thereof be affirmed or the said appeal be dismissed, the said appellant will pay the amount directed to be paid by said judgment or the part of such amount as to which the judgment or order is affirmed, if
67 affirmed only in part, and all damages and costs which may be awarded against the appellant upon said appeal.

Witness our hands and seals this 13th day of August, A. D. 1886.

ALBERT J. SELIGMAN. [SEAL.]
DAVID A. CORY. [SEAL.]

TERRITORY OF MONTANA, } ss:
*County of Lewis & Clarke,* }

Albert J. Seligman and David A. Cory, whose names are subscribed as the sureties in the foregoing undertakings, being severally duly sworn, each for himself says that he is a resident and freeholder of the county and Territory aforesaid, and is worth the sum in said undertaking specified as the total penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

ALBERT J. SELIGMAN.
DAVID A. CORY.

Subscribed and sworn to before me this 14th day of August, A. D. 1886.

[SEAL.] WM. WALLACE, JR.,
*Notary Public.*

68 The foregoing undertaking and the sureties thereon severally approved and a stay of execution ordered thereon, pursuant to the stipulation filed.

D. S. WADE,
*Judge of the District Court, 3rd Judicial District, Lewis & Clarke County, M. T.*

TERRITORY OF MONTANA, } ss:
*County of Lewis & Clarke,* }

I, B. H. Tatem, clerk of the third judicial district court of Montana Territory in and for Lewis & Clarke county, do hereby certify that the annexed and foregoing is a true and correct copy of transcript and statement on appeal, answer, agreement between Ætna Iron Works and Gregory Consolidated Mining Co., bond of Malter & Starr to Gregory Company, complaint, decree, demurrer, deposition of Malter, deposition of Hesse, defendant's instructions, Exhibits 1, 2, 3, and 4, exceptions to deposition of Malter, exceptions to deposition of Hesse, letter of Malter to Gregory Co., letter of Child
69 to Ætna Iron Works, letters of Hesse to Child, motion for nonsuit, notice of appeal, plaintiff's instructions, statement on appeal, specification of errors, testimony of H. W. Child, and un-

dertaking on appeal in the above-entitled cause, wherein Lewis M. Starr is plaintiff and The Gregory Consolidated Mining Company and Henry E. Kavanaugh are defendants, as appears by the records of this court.

Witness my hand and the seal of the said court, affixed this 29th day of December, 1886.

[SEAL.] B. H. TATEM, *Clerk*,
By C. G. REYNOLDS, *Deputy Clerk*.

Filed Jan'y 3, 1887.

I. R. ALDEN,
*Clerk Supreme Court of Montana.*

70 *Proceedings in the Supreme Court.*

In the Supreme Court of Montana Territory. January Term, 1887.

LEWIS M. STARR, Respondent,
*vs.*
THE GREGORY CONSOLIDATED MINING COMPANY *et al.*, Appellants.

Be it remembered that in the present term of January, A. D. 1887, the above-entitled cause was brought into the supreme court of Montana Territory by virtue of an appeal agreeably to law, and the transcript of the record therein of the court below was duly filed and the cause docketed and assigned for hearing at said term; and the said cause coming on to be heard before the court upon the said transcript of record, the same was argued by counsel. Thereupon, the cause coming on for the decision and judgment of the court on appeal, the court delivered its opinion and decision in writing, of which the following is a copy, viz:

71 *Opinion.*

In the Supreme Court of Montana Territory. January Term, 1887.

LEWIS M. STARR, Respondent,
*vs.*
THE GREGORY CONSOLIDATED MINING COMPANY *et al.*, Appellants.

Appeal from 3rd jud. district, Lewis & Clarke county.

MCLEARY, *J.*, delivered the opinion:

This case is nearly similar to the one just preceding, having the same title but a different number, being numbered 513 on the calender of this court. The only material points of difference are that this action is based on the first payment falling due, and an attachment was issued herein and no mechanics' or builders' lien was claimed, and the case was tried before the court without a jury.

The same errors are assigned and specified and the same exceptions taken, except in respect to giving and refusing instructions to the jury. It is only necessary here to refer to our opinion in
72 the preceding case and base our action herein on the views therein expressed.

For the reasons heretofore stated there is no error in the judgment of the district court, and the same is accordingly affirmed with costs.

Filed Jan'y 28, 1887.

I. R. ALDEN, *Clerk.*

Thereupon judgment on appeal was entered in said cause as follows, to wit:

In the Supreme Court of Montana Territory. January Term, 1887.

LEWIS M. STARR, Respondent,
*vs.*
THE GREGORY CONSOLIDATED MINING COMPANY *et al.*, Appellants.

*Judgment on Appeal.*

Be it remembered that in the present term of January, A. D. 1887, the above-entitled action was brought into the supreme court of the Territory of Montana by virtue of an appeal agreeably to and in conformity with the statute of said Territory and the rules of
73 this court in such case made and provided, and the transcript of the record of the court below filed and the cause docketed and assigned for hearing by said court at the said term thereof; and the said cause, coming regularly on to be heard before the court on the said transcript of record, was argued by counsel.

Whereupon it is now here ordered and adjudged by this court that the judgment of the court below entered in said cause on the 24th day of December, A. D. 1885, on the order of the court overruling appellants' motion for a nonsuit herein be, and the same is hereby, affirmed, with costs.

And it is hereby further ordered and adjudged *that* by this court that the said plaintiff and respondent, Lewis M. Starr, recover against the said defendant- and appellant-, The Gregory Consolidated Mining Company *et al.*, — dollars for his costs herein expended and have execution therefor.

28th January, A. D. 1887.

And on the 18th day of March, 1887, appellant- filed *its* bond on appeal to the Supreme Court of the United States in the following form, viz:

74 *Bond.*

Know all men by these presents that we, Albert J. Seligman and

John C. Curtin, of Lewis & Clarke county, Montana Territory, are held and firmly bound unto Lewis M. Starr in the full and just sum of fifteen thousand dollars, lawful money of the United States of America, to be paid to the said Lewis M. Starr, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we hereby bind ourselves, our heirs, and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 17th day of March, A. D. 1887.

Whereas lately, at a term of the supreme court for the Territory of Montana, in a suit pending in said court between Lewis M. Starr, as plaintiff and respondent, and The Gregory Consolidated Mining Company and Henry E. Kavanaugh, as defendant- and appellants, there was rendered a final judgment and decree in favor of the said plaintiff and respondent and against the said defendants and appellants for the sum of twelve thousand seven hundred sixty-
75 eight dollars, besides and exclusive of interest and costs of suit; and the said defendants having sued out a writ of error from the Supreme Court of the United States, directed to the said supreme court of Montana Territory, and lodged a copy thereof in the clerk's office of said last-named court for inspection by said plaintiff, to remove said cause to the Supreme Court of the United States to reverse said final judgment and decree in said cause, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

Now, the condition of this obligation is such that if the said defendants shall prosecute their said writ of error to effect and answer all damages and costs and pay all damages and costs that may be awarded against them by reason of the suing out of said writ of error if they shall fail to make good their plea, then this obligation to be void; else to remain in full force and virtue.

ALBERT J. SELIGMAN. [SEAL.]
JOHN C. CURTIN. [SEAL.]

76 Sealed and delivered in the presence of—
C. P. CONNOLLY.

TERRITORY OF MONTANA,
*County of Lewis & Clarke,* } ss:

Albert J. Seligman and John C. Curtin, being duly sworn, each for himself makes oath and says that he is one of the sureties named in the foregoing undertaking and is worth the amount therein named as the penalty over and above all his debts and liabilities, exclusive of property exempt by law from execution.

ALBERT J. SELIGMAN.
JOHN C. CURTIN.

Subscribed & sworn to before me this 17th day of March, A. D. 1887.

[SEAL.] C. P. CONNOLLY,
*Notary Public.*

And on the 3d day of March, 1887, said defendant filed herein its writ of error to remove said cause to the Supreme Court of the United States, and on the 18th day of March, 1887, its citation herein was filed.

77 *Writ of Error.*

In the Supreme Court of the United States.

THE GREGORY CONSOLIDATED MINING COMPANY and HENRY E. KAVANAUGH, Plaintiffs in Error,
*vs.*
LEWIS M. STARR, Defendant in Error.

The President of the United States of America to the honorable the justices of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, in a cause between The Gregory Consolidated Mining Company and Henry E. Kavanaugh, plaintiffs in error, and Lewis M. Starr, defendant in error, a manifest error hath happened, to the great damage of the said Gregory Consolidated Mining Company and Henry E. Kavanaugh, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
77*a* the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said Supreme Court to be then and the- held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this third day of March, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal Supreme Court, Montana Territory.]

ISAAC R. ALDEN,
*Clerk of the Supreme Court of Montana Territory.*

Allowed.
DECIUS S. WADE,
*Chief Justice.*

[Endorsed:] No. 1. In Supreme Court of the United States. Gregory Consolidated Mining Company and Henry E. Kavanaugh, pl'ffs in error, *vs.* Lewis M. Starr, def't in error. Writ of error. Filed March 3, 1887. I. R. Alden, clerk.

78 *Citation.*

In the Supreme Court of the United States.

THE GREGORY CONSOLIDATED MINING COMPANY and HENRY E. KAVANAUGH, Plaintiffs in Error,
*vs.*
LEWIS M. STARR, Defendant in Error.

[Seal Supreme Court, Montana Territory.]

To Lewis M. Starr, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Montana Territory, wherein The Gregory Consolidated Mining Company and Henry E. Kavanaugh are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of the supreme court of Montana Territory, this third day of March, A. D. 1887.

DECIUS S. WADE,
*Chief Justice.*

Service of a certified copy of the foregoing citation accepted the 14th day of March, 1887.

SANDERS, CULLEN & SANDERS,
*Att'ys for Respondent.*

[Endorsed:] No. 1. Original. In Supreme Court of the United States. Gregory Consolidated Mining Company and Henry E. Kavanaugh, pl'ffs in error, *vs.* Lewis M. Starr, def't in error. Citation. Filed March 18, 1887. I. R. Alden, clerk.

79 In the Supreme Court of Montana Territory.

THE GREGORY CONSOLIDATED MINING CO. *et al.*, Plaintiffs in Error,
*vs.*
LEWIS M. STARR, Def't in Error.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing seventy-six pages contain a full,

true, & correct transcript of certain pleadings, records, and proceedings filed, made, and had in the above-entitled cause as the same appear on file and of record in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said supreme court this 27th day of June, A. D. 1887.

Seal Supreme Court, Montana Territory.

ISAAC R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory supreme court. No. 357. The Gregory Consolidated Mining Company & Henry E. Kavanaugh, plaintiffs in error, *vs.* Lewis M. Starr. Filed April 24, 1888.

No 5711

~~MONTANA TERRITORY.~~

U. S.

# Supreme Court.

~~JANUARY TERM, 1887~~

LEWIS M. STARR,
*Respondent.*

vs.

THE GREGORY CONSOLIDATED MINING CO. AND HENRY E. KAVENAUGH,
*Appellants.*

*Points and Authorities of Appellant.*

TOOLE & WALLACE,
Attorneys for Appellant, Gregory Con. M'ng. Co.

HELENA, M. T.:
INDEPENDENT PUBLISHING CO.
1887.

# MONTANA TERRITORY.

## IN SUPREME COURT.

JANUARY TERM, 1887.

LEWIS M. STARR,
*Respondent.*
vs.
THE GREGORY CONSOLIDATED MINING CO. AND HENRY E. KAVENAUGH.
*Appellants.*

*Points and Authorities of Appellant.*

I.

This appeal is from a decree rendered in an action brought by the respondent and plaintiff against the appellant and one Henry E. Kavnaugh, to foreclose a certain mechanics bill filed by Starr upon the concentrating works and mill of appellant for the sum of $20.000, alleged to be an unpaid balance due him on account of the construction of said mill and works under a certain contract (see transcript p. 17–19), and in compliance therewith. Appellant's answer denies the construction of the mill and works in compliance with the contract, and denies the *acceptance of*

*the work*, and presents a counter claim of $9,800 as damages sustained by failure to complete the works within the time named in the *contract* (see transcript p. 9–11) and their amended answer (transcript p. 14) alleges an agreement to pay the agent of appellant the sum of $5,000 in the event he should contract with them, and asks that it be permitted to claim the benefit of this agreement. The action was begun in Jefferson county, transferred on Oct. 21st, 1885, for trial to Lewis and Clarke county, and there tried before a jury on the 23d day of December, 1885, and a verdict rendered for plaintiff for $15,000 and interest. The errors complained of occurred during the progress of the trial, are found on pp. 54 and 55 of the transcript, and will be considered in the order there presented.

II.

The second specification of error found on page 54 consists of alleged error of the Court in overruling objections made by appellant to certain questions and answers in the deposition of G. B. Malter; which objections and exceptions are found specifically and properly enumerated on pages 27, 28 and 29 of transcript, and of which the first three, viz.: Objections to questions and answers Nos. 6, 7 and 8, involqe the question as to whether or not the contract provided for the delivery of a bill of lumber by Malter to H. W. Child; and further, that even if this were the case, the reference to lumber mrde in the answers to questions 7 and 8 refers to other lumber than that contained in the bill, and is not responsive to the questions themselves. An examination of the contract discloses the fact that the mill was to be completed and delivered in perfect running order within four months of its date, provided that the lumber required to be used should be delivered upon the ground within 40 days after the receipt of the bill for said lumber by H. W. Child, representing the party of the second part. The ob-

jections to questions and answers Nos. 9, 10 and 12, respectively, present a material proposition relied upon by the appellants to reverse the judgment of the Court below. It is manifest from the objections and from the questions and answers that the act or declaration of one Charles Hesse in accepting or purporting to accept the mill and machinery under the contract, was admitted in evidence BEFORE any proof of his agency had been introduced, and *before* any proof of authority to act in behalf of appellant, in accepting the same under the contract. It appears from the contract itself that indebtedness under it could only be created, or a right to action arise within a certain number of days after the acceptance of the concentrating works and machinery in accordance with its terms. The only acceptance proven, or sought to be proven, was one purporting to be made by the above named Charles Hesse, and this proof of acceptance was introduced under objection by appellant prior to any authority having been shown in Hesse so to act for it. The question primarily arises, therefore, whether under any circumstances the act or declaration of an agent is admissible against his alleged principal until the agency has been established and proven. Under the Common Law practice this question was an open one and the decisions of the different States were divided upon it. The following authorities sustain the position that even at common law the agency must be established before the act or admission of the alleged agent can be given in evidence against the principal, and that the proof must be further and other than that of the mere declamation of the agent himself.

Francis vs. Edwards, 76 North Carolina 271.
Breckenridge vs. McAfee, 54 Indiana 141.
Streeter vs. Poor, 4. Kansas 412.
Mapp vs. Phillips, 32 Georgia 72.

Brigham vs. Peters, 1 Gray, 139.
Fairlis vs. Hastings, 10 Vesey 126.
Campbell vs. Hastings, 29 Arkansas 512.
Peck vs Ritchie, 66 Missuri 114.
Coon vs. Gurley, 49 Indiana 199.
Reynolds vs. Ferree, 86 Ill. 570.
Barrow vs. Brown, 28 La. Ann. 459.
Moore vs. Ritter, 11 Humpreys 67.
1st Green on Ev., § 113.
Story on Agency, §134.

We apprehend, however, that whatever may have been the conflict upon this question at common law, the matter has been finally put at rest by our code, and that under our practice it is manifestly error to admit the act or declamation of an agent until his agency shall have been first established by sufficient evidence. Our code, sec. 624, subdivision 5th, page 156, provides, "AFTER proof of a partnership or agency, the act or declaration of a partner or agent of the party within the scope of the partnership or agency and during its existence." Here, therefore, we conceive the Court committed a manifest error, and it is a familiar principle that where error is committed injury is presumed: and it must clearly appear, to avoid the error, that no injury accrued.

Jackson vs. F. R. Water Co., 14 Cal. 18.
Norwood vs. Kenfield, 30 Cal. 393.

It is manifest, however, that this was a material error, and that appellants were injured thereby, as no other proof of the authority of Hesse to accept the mill under the contract so as to bind the Company, was subsequently introduced. And this acceptance by the Company was material to the right of action and recovery, as appears from the contract and the instructions of the court. The contract

was entered into by H. W. Child; the alterations were accepted by Jesse Lilienthal, the President of the Company (see record, p. 29) and all further evidence in the cause discloses a want of authority rather than possession of authority by Hesse to accept that or any mill on behalf of the Company. The only pretense of any testimony as to the authority of Hesse is found upon page 25 of the transcript, lines 9 to 12, and consists simply of declarations by Child and Lilienthal, themselves the agents of appellant, and without any authority so far as appears from the evidence to redelegate their authority to any other person, that when the mill was acceptable to Hesse *it would be* acceptable to the Company defendant; and this, given its ordinary interpretation, would simply indicate that when Hesse was satisfied as superintendent with the mill as constructed, the Company would accept it in accordance with the terms of the contract; and the subsequent alteration was accepted by Lilienthal, the Company's President.

## III.

The third specification of error comprises objections to questions and answers Nos. 6 and 12 of the deposition of Charles Hesse. The objections to question and answer No. 6 involve the identical propositions heretofore discussed under subdivision 2, and need not be again referred to, save as they may be discussed under specification No. 4 upon the ground that plaintiff in his entire case failed to prove any duly authorized acceptance under the contract in behalf of the Company. The answer to question No. 12 was objected to for the reason that the same was not responsive to the question, in that the question simply required an estimate from the witness of the capacity of the concentrator, and

did not require that any reason for the estimate should be given. The answer, therefore, containing as it did what purported to be a reason for the giving of the estimate required by the question was not responsive to it, and to this extent should have been stricken out upon the objection of defendant. The irresponsive portion of the answer presented matter material in the question of defendant's counter claim for damages by reason of failure to complete the concentrator within the time provided, and could not have been anticipated from the question itself so as to have been met by defendant by cross-interrogatories, or to have become the subject of cross-examinations. In this, therefore, we submit, the Court likewise erred, and that this error was manifestly prejudicial to the defendant and appellant.

## IV.

The fourth specification consists of the action of the Court in overruling defendant's motion for a non-suit. The motion presents two propositions (see trascript, p. 35), the first of which, viz: That plaintiff had failed to establish a cause of action, in that by the contract proven it was provided that the sums should be payable and due a certain period after the acceptance of the mill, and that no acceptance by defendant or any person legally authorized to accept for defendant was proven, presents the question of the acceptance by Hesse and proof of his agency in a new light, i. e. granting that it were not necesseary under our practice that the agency should be established prior to the admission of the acts or declarations of the agent; or that, as is sometimes held under the common law decisions, the subsequent proof of agency cures the injury, was there here established by the plaintiff's case in chief any au-

thority upon the part of Hesse to bind the company by an acceptance, so as to enable them upon Hesse's acceptance to maintain an action under the contracts. The contract itself undertakes to define the extent of the powers conferred upon Hesse with relation to it, and clearly precludes the possibility of the possession of this power by him. He is expressly given the power to accept the designs to be submitted by Malter, but it is therein expressly provided that the mill shall upon completion be accepted by the party of the second part. (See transcript, p. 18, lines 12-18; p. 19, lines 15-24.) The testimony of G. B. Malter is simply to the effect that Hesse accepted the mill, (p. 25, lines 1-27) and that Child told him that he must make the mill acceptable to Hesse. This latter testimony was objected to, it being but the mere declaration of an agent in whom no power of delegating authority had been shown, and it not appearing that the declaration was made by the agent during the course of his employment. Hesse himself specifically testifies that he did not think it necessary to obtain any authority to accept the mill, and therefore that he obtained none. (p. 32, lines 1-16.) and that he simply showed his letter of acceptance to H. W. Child. This, coupled with the further testimony of Malter, likewise objected to and introduced under objection found on page 25, lines 9 to 12, constitute the only testimony in chief referring in any manner to the Hesse acceptance. The only acceptance made was of the amendments to the contract, which was made by Lilienthal, and no authority in Child to delegate any of his powers was proven or sought to be proven. And the evidence conclusively shows that Hesse had absolutely no authority to accept the mill under the contract; that his act was unauthorized and not binding upon the company. Aside from the fact that the plaintiff's right of action depended upon an acceptance by appellant, the in-

structions of the Court show that an acceptance by appellant would preclude a claim for damages on account of delay and forbid the interposition of the counter-claim pleaded.

Chicago R. R. Co. vs. La., 60 Ills. 501.
Anderson vs. Rome R. R. Co., 54 N. Y. 334.
Stiles vs. Western R. R. 8 Mich. 64.
Doe vs. Robinson, 24 Mo. 668.
Mundhenk vs. Ceute. Iowa R. R. Co., 57 Iowa 718.
Myer vs. Virg. and Truck R. R. Co., 16 Nev. 341.
Green vs. Ophir C. S. & G. M. Co., 45 Cal. 552.

V.

The fifth specification of error relates to the materiality of a certain question put by appellant, but excluded by the Court, and found upon p. 37, lines 21 26. This question was manifestly material and its exclusion error. The record discloses that the mill was not completed within the time provided by the contract. Plaintiff had introduced evidence to show that the delay was occasioned through fault of appellant by failure to have the lumber upon the ground in accordance with the terms of the contract. The Court instructed the jury that if it were established that the defendant failed to provide lumber in time, this would entitle the plaintiff to a resonable time in which to fulfill the contract, and this question tended directly to show the unreasonable character of the delay, in that it would have tended to show that the machinery was not ready at the time of the completion of the mill building, and therefore that the delay was not due to the failure to have the lumber upon the ground at the time.

## VI.

The sixth specification relates to the offer to prove as a measure of damage the actual daily expense and outlay of defendant in its business, which offer is found upon page 38 of the transcript. Proof of whatever approximate damage was sustained by appellant by reason of the failure of plaintiff to comply with the contract within a reasonable time was clearly admissible in support of the counter claim set forth in defendant's answer. The offer discloses the fact that appellant was engaged in no other business than in the reduction of ores, had no other mill or machinery for reducing the same than the one to be constructed; that all its expenses were incurred in said business, and that this mill and machinery had been relied upon; by reason of the failure to obtain the same for use they were put to a large daily expense. We submit that in the light of the authorities this was an approximate damage, and that the exclusion of this testimony as offered constitutes error.

## VII AND VIII.

Specifications seven and eight relate to the exclusion of certain letters found upon pages 38, 39, 40 41, 42 and 43 of the transcript. The Hesse letters, each and all, tended to contradict the testimony of Hesse himself, as appears from the deposition, particularly the answer to interrogatory 10, and were also admissable as original evidence, for the reason that by the contract, as to the designs, Hesse was made the agent of *both* parties and his declarations were admissable against either.

## IX AND X.

Specifications nine and ten relate to the giving and refusal of certain instructions, and the former has been already considered under sub-division four. We submit that the instructions presented by appellant and refused by the Court, and found upon p. 51, lines 6 to 11 of the transcript, correctly stated the law, and that its refusal was error by the Court Time was clearly the essence of this contract, because expressly therefor stipulated: and if, therefore, the failure to comply with the provisions of the contract as to time was without the fault of the company, then plaintiff would be compelled to resort to a *quantam meruit*, and could not recover upon the contract.

7th Amer. Dec., 492, and 10th Cal. 327, *et seq.*

And in this instance, as the question relates to the refusal to give an instruction the question of injury is immaterial, for its effect on the jury cannot be determined.

Buseinne vs. Coffe, 14 Cal. 91.

Respectfully submitted

TOOLE & WALLACE.

Attorneys for Appellant Gregory Con. Mng. Co.

Edwin W. Toole

Wm Wallace Jr.

FILED.
APR 29 1891
JAMES. H. McKENNEY,
CLERK.

# United States Supreme Court.

OCTOBER TERM, 1890

THE GREGORY CONSOLIDATED MINING COMPANY AND HENRY E. KAVANAUGH,
PLAINTIFFS IN ERROR,
*vs.*
LEWIS M. STARR,
DEFENDANT IN ERROR.

*No.* 357.

## Brief for Defendant in Error.

W. F. SANDERS,
*Of Counsel for Defendant in Error.*

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1891.



# United States Supreme Court.

OCTOBER TERM, 1891.

THE GREGORY CONSOLIDATED MINING COMPANY AND HENRY E. KAVANAUGH, PLAINTIFFS IN ERROR,
*vs.*
LEWIS M. STARR, DEFENDANT IN ERROR.
*No.* 357.

## STATEMENT OF CASE.

This action was brought to recover ten thousand dollars, an installment alleged to be due to the defendant in error on a contract made by defendant in error and one Malter with the Gregory Consolidated Mining Company, whereby said defendant in error and Malter agreed to build and equip a concentrating quartz-mill for the said Company for fifty thousand dollars, twenty thousand dollars to be paid on shipment of machinery from San Francisco therefor, and the balance in three ten thousand dollar installments, to become due in thirty, sixty, and ninety days respectively from the acceptance on completion of said mill by the plaintiff in error. The first payment was made on shipment of machinery—twenty thousand dollars. Malter

assigned his interest to the defendant in error, who brought the suit. There was another count in the complaint for eight hundred dollars for goods, wares, and merchandise sold and delivered, about which there was no resistance by the plaintiff in error. The complaint states the two causes of action adequately, and there is no assignment of error as to its insufficiency, nor as to any variance between the pleading and the proof. As the errors, if any occurred, were at the trial, it is proper to ascertain what were the issues to be tried. The answer denies—

1st. That the defendant (the plaintiff in error) made or entered into the contract upon which the action was instituted.

2d. That it agreed to pay any sums whatever upon the terms or conditions mentioned in the complaint.

3d. That Hesse or anyone for it accepted or received said work or machinery under said contract, or as completed according to the terms thereof.

4th. That the plaintiff (defendant in error) and G. H. Malter were partners.

5th. That Malter assigned his interest in the contract.

6th. That the defendant (the plaintiff in error) is or was indebted to anyone in any sum under said contract.

By competent proof it is established that this contract was made. The assistant general manager, Mr. H. W. Child, who had verified the answer, nevertheless testified to the execution and delivery of the contract, which was in writing, and is printed in the record, although its substance only is pleaded in the complaint, with omission of immaterial provisions. When produced and identified there was no claim of surprise, or variance, or objection to its introduction as evidence, nor is any error assigned therefor.

It establishes the proposition that the defendant (plain-

tiff in error) did agree to pay ten thousand dollars within thirty days of the acceptance on completion of the mill by plaintiff in error.

It appears from the evidence that one C. Hesse assumed to accept for the plaintiff in error not the "work or machinery," but the mill as completed according to the terms of the contract, and the only question is as to his authority. The answer does not say the mill was not completed according to the terms of the agreement; it does not deny the allegations of the complaint "that Starr and Malter performed all the conditions of said contract by them to be performed, and fully completed said mill," but relying on a mere evasion it says it did not accept or receive "said "work or machinery under said contract, or as completed "according to the terms thereof." By the terms of the contract the acceptance was to be upon completion of the mill. Now if it was true that Starr and Malter "per- "formed all the conditions of said contract by them to be "performed and fully completed said mill," the plaintiff in error could not avoid payment by declining to accept the same. It could not avail itself of its own neglect or wrong to delay the payment, and therefore its answer does not deny enough to make an inquiry as to acceptance material. But if inquiry as to acceptance is material, Hesse's authority is amply sustained by the proof. After correcting Mr. Malter's drawings of the mill to be built Mr. Hesse accepted the same, so says the complaint. He at the mine designed jigs, twelve like unto which were a part of this contract. The answer does not say Hesse had not authority to accept, but says that Hesse did not accept. The contract was that the mill should, when complete, reduce and concentrate seventy-five tons of ore per day, as agreed upon between Professor Hesse and G. H. Malter. Malter says Hesse was superintendent of the plaintiff in error,

and that he accepted the mill. Prof. Hesse wanted things done not provided in the contract to be done, and Child, the assistant general manager, said the mill was to be built to please Hesse. Hesse managed the mill after its completion and had full control. After the contract was made he changed the size of rolls, construction of building, added concentrators and sizing apparatus, for which the Company paid, and Starr and Malter were ordered by Child to make such changes as Hesse ordered. The President of the Company and Assistant General Manager Child said when Hesse was satisfied it would be acceptable to the Company. Malter says the specifying of objections was agreed on, and it is probable the undated letter on page 11 of the record was in pursuance of that, but it shows that it or some of it was outside the contract, and added sums were to be paid. Professor Hesse was "demanding changes," and the Company agreed to take one of the two Blake crushers asked for by Professor Hesse after it had made the next payment of ten thousand dollars. Child said Hesse was his representative at the works. Hesse said he had charge of their concentrating and smelting works. Child and Hesse decided where the new mill was to be built. Child made no objection to Hesse's letter of acceptance when shown it. Hesse made changes so that mill should conform to contract, and seems to have been all and in all. His agency is amply *prima facie* proven, and by no word of the testimony of the plaintiff in error was it denied.

It is not given to litigants to enter into the interior mechanism of corporations and trace historically and chronologically the transmission of authority from the corporate entity to the instrumentality by which in the world of business it conducts its affairs, they cannot attend its corporate meetings, and courts do not allow such bodies to deceive

the business world or play tricks upon them by actually withholding authority from him who seems to have it. There is much law learning and there are many authorities upon this question. (*United States Bank* v. *Dandridge*, 12 Wheaton, 64; *Reed* v. *Ashburnham R.R. Co.*, 120 Mass., 43; *Philips* v. *Campbell*, 43 New York Reports, p. 271; Angell and Ames on Corporations, 283–4, Sec. 97; *Northern Central R.R. Co.* v. *Bastian*, 13 Maryland, 494; *Clark* v. *Benton Manufacturing Co.*, 13 Wendell, 256; Taylor on Private Corporations, Secs. 202–4, 252; see also *Rolling Mill* v. *St. Louis R.R. Co.*, 120 U. S. 256; *Sprangler* v. *Butterfield*, 6 Colorado R. 356; Wood's Field on Corporations, 182–3.)

This ends the matter, so far as the issues made by the pleadings are concerned. If to this point no material error intervened the discussion is ended. The trial, if one occurred, seems to have been in large part an excursion outside the issues, of interest to the excursionists, but of no consequence in this forum.

On the issue made by the first denial as numbered in the brief, viz., whether the plaintiff in error made the contract sued on, the Assistant General Manager of the Company identified the written contract made by the plaintiff in error, and it was read in evidence without objection. On that issue then there was no error, and thenceforward the case stood in the position of a party contracting to pay for a mill to be built, which was in all respects built as agreed, according to its own admission, and endeavoring to escape payment therefor.

On the issue made by the second denial as numbered in the brief, viz., whether it agreed to pay the money alleged on the terms and conditions mentioned in the complaint, claiming nothing from the negative pregnant form of the denial and its consequent infirmity, the written con-

tract shows that the Company did promise to pay this money on the very terms and conditions set forth in the complaint, and that contract was not objected to, and was competent proof of the fact, and on this issue no error intervened. The proof, therefore, shows that to this stage of the proceedings the plaintiff in error made the contract and agreed to pay as alleged.

On the issue made by the third denial therein to the allegation of the complaint that the "said mill" "was fully accepted by the defendant (the plaintiff in error) more than thirty days prior to the commencement of this action," it "denies that said Hesse or anyone else for this defendant (the plaintiff in error) accepted or received" said work or machinery "under said contract or as completed under the terms thereof," observation might be made as to the form of the issue, which we forbear, and say that the mill was accepted by the "Superintendent" of the Company, by the Assistant General Manager's "representative at the works," where, if anywhere, the acceptance was to be made by the man who the persons who executed the contract said must be pleased in "the construction of that mill," by the man whom the Assistant General Manager said was authorized to make changes in the plans, and who did make changes therein which the Company paid extra therefor—whose acceptance, not whose authority to accept—is put in issue.

All this discussion, however, is a diversion. It is the judgment of which a party has a right to complain; it is from a judgment an appeal is taken; it is to a judgment a writ of error lies. The judgment implies regularity and validity. Reversal of it occurs only when the controlling processes which have culminated in it have not been consonant with law. There must be a relation between error in a suit and the judgment which terminates it, and unless

it appears that the judgment is founded on the proceedings in which the error occurred there will be no reversal. It must also appear that the contention in which the error intervened was within the issues to be tried. How is it in the case at bar? On page 24 of the Record is the judgment and the basis on which it is founded, wherein it is recited that "a trial by jury having been expressly "waived by the counsel for the respective parties, and the "said counsel having filed a stipulation with reference to "the judgment to be entered in said cause, the same was, "in accordance with the terms of the stipulation, heard by "the Court, and the proof in said stipulation referred to "was duly examined and considered by the Court, and, "after due deliberation thereon, the Court delivered its "findings and decision, and orders that judgment be en- "tered in accordance therewith; wherefore, by reason of "the law, the stipulation, and the finding aforesaid," the Court enters the judgment complained of. Before the Court can say whether there was error in entering said judgment, the Court must have in the Record a copy of the stipulation; it must know what was the "proof in "the stipulation referred to," and what were the findings on which the judgment was based. No empanneling of a jury appears, no verdict of a jury is recited or pretended. There is no pretence that "the stipulation of the counsel," or "the findings of the court," or "the proof in said stipula- "tion referred to" can be found in the Record, and hiding from this Court the basis of the judgment, it is asked to reverse it because of the insufficiency of that unknown basis. Counsel for defendant in error in this Court is personally as uninformed of what actually occurred on the trial in the District Court as are the Justices of this Court. His information, like theirs, is wholly derived from the Record. In the judgment it is recited that a trial by jury

was "expressly waived;" there is no hint of a jury, except at the bottom of pages 20, 23, and 24 of the Record, save the "plaintiff's instructions," and "defendant's instructions," pages 21 to 23 inclusive, and upon examination of them it appears they were instructions prepared and probably given in the case immediately preceding, being No. 356 in this Court.

What errors they contain are in those given at the request of the plaintiff in error. The first sentence of its instructions contains an error, but it is doubtless a clerical one, and a party is not permitted to request and obtain erroneous instructions and obtain a reversal therefor. If there had been a jury trial, the refusal to give the one instruction refused was no error. The bill for the lumber was given Manager Child the last days in July, and the four months' limitation would apply only in case the lumber was delivered by the 9th day of August, 1883, whereas it appears that the lumber was not fully delivered until October 8, 1883. Upon this point there is no conflict in the proof, and in no event could this question become a material one under the issues in this case. The argument that it was not within the province of the court to direct the order of proof is one not capable of being sustained by authority at common law, nor under the statute of Montana, which is but a codification of the common-law rule that a statement made by a third person shall not be efficient to affect the rights of a party until the authority of such third person in respect of the matter involved is fully shown, but in practice it is reduced to a question of the order of proof, it is believed, in every jurisdiction. The subject had the painstaking consideration of this Court in *Unitarian Society* v. *Faulkner*, 91 United States, 415.

There was probably in this case a stipulation filed that upon the trial of the other case (356) the judgment in this

case should conform to the result in that, and that upon production of that stipulation the Court entered a judgment conformable to the stipulation, but as no stipulation is made of record this Court cannot say that any error intervened. It is not, perhaps, professional to pursue the argument of the counsel for the plaintiff in error, which was prepared for another transcript in another court and which misplaces alleged errors and misdirects the Court here, for with entire respect to the distinguished counsel who prepared it for use there, it seems to us frivolous, and even if it were otherwise, its filing here is not in conformity to the rules of this Court, and it imposes unnecessary burdens upon an already overburdened tribunal. If errors in records of this Court are to be searched out upon as vague suggestion as this brief contains with its misleading references, the labor of the Court is to be made yet more onerons. The record makes it plain that the entire defence was an afterthought and without substantial merit. The plaintiff in error does not make manifest sufficient confidence in its cause to print for this Court a new brief, and unless we have signally mistaken the quality of the alleged errors, this Court, without suggestion from the defendant in error in this case, will make inquiry as to what damages will tend to discourage appeals for delay and the suing out of writs of error from purely frivolous motives.

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